IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 598 OF 2005
WITH
CHAMBER SUMMONS NO.961 OF 2005

1. M/s.Chitralekha Builders.

2. Smt.Nina Anil Shah. ... Appellants.

V/s.

1. G.I.C. Employees Sonal Vihar
   Co-op. Housing Society Ltd.

2. Shri Pandurang Harichandra Vaity,

3. Smt.Damayanti P. Vaity,

4. Shri Pradip Pandurang Vaity,

5. Shri Kishore Pandurang Vaity,

6. Kum.Sadhana P. Vaity,

7. Kum.Nirmala P. Vaity,

8. Gopal Harishchandra Vaity,

9. Smt. Mahananda Gopal Vaity,

10. Kiran Gopal Vaity,

11. Mahesh Gopal Vaity,

12. Madhukar Gopal Vaity,

13. Avnish Gopal Vaity,

14. Vasudev Harishchandra Vaity,

15. Smt.Nandini Vasudev Vaity,

16. Kum.Swati V. Vaity,

17. Kumar Dipak V. Vaity,

18. Kum.Priti V. Vaity,

19. Kumar Sandip V. Vaity,

20. Anant Langda Vaity,

21. Smt.Sunanda Anant Vaity,

22. Smt.Thakibai Baburao Vaity,

23. Bhiwa Bama Vaity,

24. Smt.Devikabai Bhima Vaity,

25. Manhor Bhiwa Vaity,

26. Kamlakar Bhiwa Vaity,

27. Namdev Bhiwa Vaity,

28. Kum.Sharda Bhiwa Vaity,

29. Dilip Bhiwa Vaity,

30. Premnath Bhiwa Vaity,

31. Bharti Bhiwa Vaity,

32. Kum.Rajani Bhiwa Vaity,

33. Ravindra Bhiwa Vaity,

34. Dinesh Bhiwa Vaity,

35. Barat Yesu Vaity,

36. Kusum Yesu Vaity,

37. Revati Yesu Vaity,

38. Smt.Bhima Bhiku Kenu,

39. Smt.Savitri Baburao Vaity,

40. Smt.Tai Baburao Madhani,

41. Yamuna Ganesh Vaity,

42. Malati Wife of Kamlakar Patil,

43. Bhalchandra Atmaram Patil,

44. Lalita Bhalchandra Vaity,

45. Smt.Prabhavati Anand Madhani,

46. Smt.Narmada Damodar Vaity,

47. Smt.Manjua Ratnakar Vaity,

48. Smt.Gulab Bhagwan Subedar,

49. Jaywant Damodar Vaity,

50. Ganesh Damodar Vaity,

51. Kailash Damodar Vaity,

52. Shri Hemant Damodar Vaity,

53. Kumar Keshamath Damodar Vaity,

54. M/s.Shreenath Builders,

55. Mrs.Kusum Bhaskarrao Gorule. ... Respondents.

E.K.Sasidharan for the appellant

H.N.Thakore with Ms.Jyoti Ghag i/b. Thakore &
Jariwala for respondent No.1.

Bimal Bhabhde i/b. Apte & Co.
for respondent Nos.2 to 52.

P.S.Rao i/b. A.C.Mahimkar for respondent No.54.

CORAM : V.C.DAGA AND A.S.AGUIAR, JJ.

RESERVED ON : 2nd August, 2005.

PRONOUNCED ON : 19th August 2005.

JUDGMENT : (Per V.C.Daga, J.)

. Admit.

2. Heard finally by consent of parties at the stage of admission, dispensing with the record and proceedings since the parties agreed that all the relevant documents for deciding appeal are available on record.

3. This appeal is directed against the order dated 26th October, 2004 passed by learned single Judge to the extent it rejects Chamber Summons No.1334/2004 in Suit No.1335/1988.

4. The chamber summons was moved by the appellants to become co-plaintiffs in the suit filed by respondent No.1 and respondent No.55 against respondent Nos.2 to 54 (original defendant Nos.1 to 53). According to the appellants, they were and are interested in the suit property. Without their presence all the questions involved in the suit cannot be effectually and completely decided.

Outline Chronology :

5. The outline chronology leading to the present appeal is as under:

6. The property in question bears Survey No.281, C.T.S.No.727; admeasuring 5082 sq.yrds. or thereabout equivalent to 4249.29 sq.mts. situated at village- Mulund, Taluka- Kurla, Mumbai- 400 080; more particularly described in Exh.B forming part and parcel of the plaint ("the suit property" for short).

7. The parties to the appeal are hereinafter referred to in their original capacity i.e. as described in the suit for the sake of clarity.

8. The suit was filed for specific performance of an agreement dated 28th April, 1980 entered into between plaintiff No.2 - Mrs.Kusum Gorule @ Geetanjali Sohani ("Mrs.Kusum" for short) and defendant Nos.1 to 52 in the suit/ respondent Nos.2 to 53 herein, the original owners of the suit property ("Vaity family"). According to the plaintiffs, an agreement dated 28th April, 1980 was for the benefit of plaintiff No.1/ respondent No.1 - G.I.C. Employees Sonal Vihar Co-operative Housing Society Ltd. ("G.I.C. Society" for short) with whom Mrs.Kusum under an agreement dated 9th May, 1980 agreed to provide constructed area after developing the suit property.

9. The suit filed was registered as Suit No.1335 of 1988 on the original side of this Court. During the pendency of the suit, disputes and differences arose between plaintiffs inter se and they found it difficult to prosecute suit as co-plaintiffs. Consequently, Chamber Summons No.1324/2003 was taken out by plaintiff No.1 (G.I.C. Society) for transposition of plaintiff No.2 (Mrs.Kusum) as defendant, along with another Chamber Summons No.1325/2003 for amendment to implead the present

appellants, applicants in Chamber Summons No.1324/2003 so as to make them parties to the suit as defendants along with plaintiff No.2. As a counter blast, Chamber Summons No.276/2004 was taken out by plaintiff No.2 - Mrs.Kusum to transpose plaintiff No.1 as defendant.

10. The present appellants had also taken out Chamber Summons No.1334/2004 to become co-plaintiffs in the suit contending that plaintiff No.2 Mrs.Kusum had transferred her interest in the agreement dated 28th April, 1980 in favour of the partnership firm M/s.Chitralekha Builders of which appellant No.2 is one of the partners with Mrs.Kusum and two others.

11. The chamber summons was opposed by the plaintiffs contending that the appellants herein could not be the co-plaintiffs in absence of their consent since the plaintiffs are 'dominus litis'. The learned single Judge, simultaneously, heard all the chamber summonses and chose to dispose them of by a common order dated 26th October, 2004, the details of which are given hereinafter.

12. Chamber Summons No.1325/2003 taken out by plaintiff No.1 (G.I.C. Society) came to be rejected, where as Chamber Summons Nos.1324/2003 and 276 of 2004 came to be allowed in terms of the following order :

(i) Plaintiff no.1 is transposed as Defendant No.54.

(ii) Plaintiff no.2 shall not settle compromise or withdraw the suit without giving at least four weeks written notice of her intention to do so to Plaintiff no.1 and their advocates.

(iii) If Plaintiff no.2 withdraws or compromises the suit in any manner and for any reason whatsoever, Plaintiff no.1 shall without further orders be transposed as the Plaintiff.

(iv) It will be open to Plaintiff no.1 to continue even as a Defendant to take all steps, and urge all contentions in support of the decree sought. It is agreed between the parties that in the prayers the reference to Plaintiff no.1 shall now read as Defendant no.54 without a formal amendment to that effect.

(v) The disputes between the Applicants in Chamber Summons No.1334 of 2004 and Plaintiff no.2 shall not affect the rights of Plaintiff no.1 in any manner whatsoever.

13. Chamber Summons No.1334/2004 taken out by the appellants herein also came to be rejected. This order to the extent it rejects Chamber Summons No.1334/2004 is a subject matter of challenge in this appeal.

Subsequent Events :
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14. The ordinary rule of civil law is that rights of the parties stand crystalised on the date of institution of lis. However, the Court has power to take note of the subsequent events and mould relief

accordingly. The subsequent events urged by the appellants are basically the factual events, which are not in dispute. They were allowed to be brought on record by way of affidavits and counter affidavits.

15. The appellants have filed affidavit dated 25th July, 2005 stating that subsequent to the impugned order dated 26th October, 2004, plaintiff No.1 (respondent No.1 herein) (G.I.C. Society) was transposed as defendant No.54, with the result, original plaintiff No.2 (respondent No.55 herein; Mrs.Kusum) alone continued to be the plaintiff. Mrs.Kusum during the pendency of the suit, entered into consent terms with Vaity family , defendant Nos.1 to 52 (respondent Nos.2 to 53). The consent terms dated 16th February, 2005 drawn were recorded by learned single Judge (S.K.Shah, J.) on the very same day. i.e. 16th February, 2005. The decree in terms of said consent terms came to be passed, whereby it was, inter alia; agreed that the vendors i.e. defendant Nos.1 to 52 (Vaity family) shall execute conveyance in respect of suit property, in favour of Mrs.Kusum or her nominee. In terms of the said consent terms, deed of conveyance was executed on 25th July, 2005 by defendant Nos.1 to 52 in favour of nominee of Mrs.Kusum - M/s.Oswal Enterprises, Sultan Road, Mumbai. That is how, the dispute between Mrs.Kusum and Vaity family has come to an end.

However, the Court Receiver is still in possession of the suit property, since possession has not yet been handed over either to Mrs.Kusum or her nominee in terms of consent decree and deed of conveyance.

16. After consent decree in favour of Mrs.Kusum, pursuant to the order of the learned single Judge dated 16th October, 2004, there was again transposition of the parties. Accordingly, respondent No.1 (G.I.C. Society) came to be transposed as plaintiff and, in turn, plaintiff No.2 (Mrs.Kusum) came to be transposed as defendant No.54 in the suit. In view of the subsequent events, now what remains is only a suit between the plaintiff - G.I.C. Society on one hand and defendant - Mrs.Kusum on the other along with M/s.Shreenath Builders, whose stake in the suit is hardly of any consequence.

17. In the light of the above subsequent events having taken place during pendency of the appeal, the appellants herein have now taken out another chamber summons in this appeal being Chamber Summons No.961/2005, to seek amendment to their original Chamber Summons No.1334/2004, praying therein that the appellants herein be impleaded in the suit as defendants instead of co-plaintiffs. The appellants have also prayed for certain interim reliefs mentioned in the Schedule of Amendment appended to the Chamber

Summons No.961/2005. The respondents in the appeal were given an opportunity to file their counter affidavits, if advised. Accordingly, one of the contesting respondents, Mrs.Kusum has filed her counter affidavit to oppose amendment to the chamber summons.

18. The plaintiff - G.I.C. Society, which is a dominus litis, has given its no-objection for joining the appellants as party defendants to the suit. All the parties to the appeal addressed this Court on merits. The appeal and Chamber Summons No.961/2005 both were heard together and by consent of parties the same are being decided on merits by this common judgment and order.

Submissions :
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19. The learned counsel appearing for the appellants submitted that presence of the appellants is absolutely necessary in order to effectually and completely adjudicate upon all the issues between the parties. He further submitted that the appellants were non-suited by the learned single Judge on the main ground that it was not open for the appellants to force themselves as co-plaintiffs in the suit against the desire of the plaintiffs. The impugned reads as under:

> "8. As far as Chamber Summons No.1334 of 2004 is concerned, the same is not maintainable. It is not open to a party to force himself as a Co-Plaintiff. If any authority is required for this proposition, a reference may be made to the case of Mustafa Shareef v. Asif Sharif reported in 1997 Mh.L.J. (NOC)-11 page 7. There is another reason why Chamber Summons No.1324 of 2004 is liable to be dismissed. An identical Chamber Summons bearing No.1040 of 1998 taken out by the Applicant was dismissed by an order dated 15th July, 1999. For the latter reason Chamber Summons no.1325 of 2003 is also liable to be dismissed. The disputes and differences between Plaintiff no.2 and the Applicant in Chamber Summons No.1334 of 2004 are not related to the dispute in the present suit.

20. Learned counsel for the appellants submits that, firstly, the learned single Judge could not have relied upon the decision in the case of **Mustafa Shareef** (supra) as full text of judgment was not available; secondly, the very same judgment in unequivocal terms lays down that, if a person applying has a stake in the litigation, then it is incumbent on the part of the Court to give him hearing by adding him as defendant. Thus, according to him, the judgment of **Mustafa Shareef** (supra) was not properly applied.

21. So far as second ground used for rejection of chamber summons is concerned, submission is that Chamber Summons No.1040 of 1998; taken out by the appellants/ applicants was dismissed in default on

15th July, 1999. This dismissal order could not have been used to non-suit the appellants. He placed reliance on the provision of order 9 rule 3 of Code of Civil Procedure, 1908 ("C.P.C." for short) to contend that in spite of dismissal of the chamber summons in default it was always open either to move a fresh chamber summons or to apply for an order to set the dismissal aside. That dismissal of chamber summons in default without there being any final adjudication on merits cannot operate as res-judicata. Reliance was placed on the judgment of the Apex Court in the case of **Krishan Lal v. State of Jammu & Kashmir**, 1994 (1) U.J. (SC) 573 in support of his latter submission. He, thus, submits that the impugned order was erroneous and cannot stand to the scrutiny of law.

22. Learned counsel thus submits that now in the changed scenario of the litigation, G.I.C. Society is the sole plaintiff; they having extended their no-objection for adding present appellants as defendants in the suit, there should no difficulty in allowing the appellants to be impleaded as party defendants in the suit. He submits that Mrs.Kusum (respondent No.55 herein) hardly can have any objection, if the sole plaintiff G.I.C. Society has no objection to add these appellants as defendants. Her objection, if any, has no legs to stand. It should be ignored.

23. In order to demonstrate the interest in the suit property, reliance is placed on the deed of partnership dated 8th April 1989 of which existence and execution is not in dispute. Relevant recitals of the said partnership deed read as under:

" DEED OF PARTNERSHIP

....

. WHEREAS by an agree development dated 28th day of April , 1980 with the owners of the property situated at C.T.S. No.727, Saojini Naidu Road, Mulund (W), Bombay- 80 has given the possession of same property for the development and SMT.GEETANJALI G. SOHANI is persuation of agreement in actual possession of the said property and started development activities.

. AND WHEREAS party of the FIRST PART i.e. SMT.GEETANJALI G. SOHANI approach the party of the SECOND PART i.e. SMT. NEENA ANIL SHAH to join with her in partnership dor the development of the property at C.T.S. No.727 Sarojini Naidu Road, Mulund (W), Bombay 400 080.

. WHEREAS PARTY of the FIRST PART i.e SMT. GEETANJALI G. SOHANI brings the property situated at C.T.S.No.727, Sarojini Naidu Road, Mulund (W), Bombay 80 in the partnership business and Smt. NEENA ANIL SHAH will bring the require capital for the purpose of development of property C.T.S.No.727 admisering about 3851.20 sq.mts.

. AND WHEREAS the parties here to have decided to carry on business in partnership in the firm name in style of CHITRALEKHA BUILDERS as builders development works, Contractors, Suppliers of Building materials, Real Estate Agents, etc., and accordingly have started the said business in partnership as 8th Day of April 1989.

. AND WHEREAS THE PARTIES HERETO NOW desirous to record the said terms and conditions into writing and THEREFOR NOW, THIS INDENTURE WITNESSESS as hereinafter recorded.

TERMS AND CONDITIONS

....
....

8. CAPITAL: The required capital of the partnership business shall be brought by party of the second part i.e. Smt.Nina Anil Shah, However party of the first part is depositing the land as capital by C.T.S.No.727 admeasuring about 3851.20 sq.mts at sarajini Naidu Road Mulund (West) Bombay-400 080.

24. Relying on the aforesaid recitals of the deed of partnership dated 8th April, 1989, the learned counsel for the appellants urged that Mrs.Kusum was in possession of the suit property in part performance of contract. Her possession was referable to section 53A of the Transfer of Property Act. She was, thus, competent to bring the said asset as her capital in the partnership firm. Alternatively, it is submitted that even if the agreement dated 28th April, 1980 is treated to be a development agreement, in that event also it was open for Mrs.Kusum to bring her asset as stock-in-trade forming capital of the partnership firm. In support of this submission reliance is placed on clause-4 of the terms and conditions of the deed of partnership, which reads as under:

4. BUSINESS: The business of the partnership shall be as Builders, Developers Contractors, suppliers of Building materials, Real Estate Agent etc. However the parties here to shall be at liberty to carry on any other business as may be agreed upon from time to time.

25. It is thus urged that in either of the situations by virtue of section 14 of the Partnership Act, all the assets with the aid of which the business was carried on by the original proprietor of M/s.Chitralekha Builders (proprietary firm) must be deemed in law to have become the asset of the partnership firm. He, thus, submits that the appellants have direct interest in the suit property. The interest of the appellants in the suit property was sufficient for them to claim impleadment as party to the suit as such the learned single Judge ought to have allowed their chamber summons. Now the submission is that, at any rate, at least, at this stage, they should be allowed to be party to the suit to protect their interest in the suit property.

26. In the submission of the learned counsel for the appellants, even in the present changed scenario the present appellants are necessary parties to the suit; may be as defendants, because plaintiff - G.I.C. Society is now enforcing its right against the property which, according to him, is the property of

the partnership firm in which the present appellants have interest in the capacity of partners. According to him, nominee of Mrs.Kusum cannot claim any interest in the suit property because the transaction would be hit by section 19 of the Partnership Act. Alternatively, it is submitted that, at the most, nominee of Mrs.Kusum could be said to have entered into the shoes of Mrs.Kusum. Any act of Mrs.Kusum, however, cannot affect interests of other partners. It is, thus, urged that to protect the interest of the partnership ;firm and its property the appellants should be made parties to the suit either by allowing the chamber summons or in exercise of discretionary power of the Court vested under order 1 rule 10 of C.P.C.

27. Learned counsel for the appellants further submits that one of the questions in the suit would be whether the plaintiff - G.I.C. Society is entitled to claim specific performance of the agreement or, in alternative, are they only entitled to claim damages. In the event suit is decided in favour of the plaintiff - G.I.C. Society, then the ultimate sufferer would be either the partnership firm or its partners as such their immovable property is at stake. In the event of monetary decree for damages, the same would be the liability of the partnership firm and its partners. He, thus, submits that considering the

matter from any angle, the appellants ought to have been and ought to be joined as parties to the suit. At any rate, even in the changed circumstances, their presence before the Court for effective and complete adjudication of all the questions is necessary. The appellants, thus, prayed that their chamber summons seeking amendment to their original chamber summons be allowed and they be added as party-defendants in the suit by allowing their appeal.

Per Contra :
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28. The learned counsel appearing for respondent No.1 - G.I.C. Society submitted that the society has no objection to permit amendment to the chamber summons moved by the appellants vide Chamber Summons No.961/2005 and further it has no objection for Mrs.Neena A. Shah being added as party defendant to the suit along with the partnership firm as per chamber summons. In support of this submission, plaintiff - G.I.C. Society has also filed on record its affidavit dated 25th July, 2005.

29. Learned counsel appearing for the contesting respondent No.55 - Mrs.Kusum tried to support the impugned order. He contends that the Chamber Summons No.961/2005 and the prayers made therein are mala fide. The intention is to make false claim upon the

property in which the appellants have no interest at all. It is further urged that the appellant - Mrs.Neena A. Shah herself has dissolved the partnership vide her letter dated 18th July, 1989, consequently, the firm is not in existence with effect from 18th July, 2005. That pursuant to the dissolution, the appellants have invoked arbitration clause and Justice A.A.Agarwal (Retd.) has been appointed as an Arbitrator vide order of this Court dated 22nd July, 2005 passed in exercise of the power under the provisions of section 11 of the Arbitration and Conciliation Act, 1996 to resolve the alleged disputes between the appellants and respondent No.54 as such their presence in the suit is not necessary.

30. It is further urged that Mrs.Kusum had filed suit in her personal capacity as proprietress of M/s.Chitralekha Builders. She had never brought her asset in the partnership firm as such appellants have no right to claim any interest in the suit property. That, at any rate, the partnership agreement was nothing but a financial arrangement between the parties to the agreement. That pursuant to the consent decree, Mr.Kusum having become the owner of the suit plot was entitled to deal with the same in absence of any prohibitory order operating against her. The appellants having not filed any appeal against the consent decree dated 16th February, 2005,

one has to presume that they have accepted Mrs.Kusum as an owner of the suit property. That Mrs.Kusum has executed deed of conveyance in favour of M/s.Oswal Enterprises and, in that view of the matter, the suit property cannot be said to be the property of the partnership. That the appellants cannot have any legal interest in the subject matter of the suit as such they are not entitled to participate in the suit. It is, thus, urged that the appellants are not entitled to claim impleadment as defendant Nos.54 and 55 in the suit. Mrs.Kusum asserted her sole right to defend the suit. In conclusion, learned counsel appearing for Mrs.Kusum urged that the appeal be dismissed as infructuous holding it to be without any merit.

Rejoinder :
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31. In rejoinder, without prejudice to the earlier submissions, learned counsel for the appellants urged that whether the firm itself has been dissolved or not is a question which can be decided by the competent Court during the trial of the suit. That may be one of the issues to be tried. He, however, urged that the partnership firm is not a legal entity distinct from its members. Therefore, the decree that may be passed against the firm under order 30 would be the decree against each member

comprising the firm as such their presence before the Court is very much necessary.

32. It is further urged that it is well settled proposition of law that suit can be filed even after dissolution in the name of the firm or against the firm. Under section 25 of the Indian Partnership Act partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. He thus submits that the suit against the firm is maintainable even though the firm stood dissolved before filing of the suit or thereafter. The dissolution or non-dissolution of the firm will hardly have any bearing on the issues involved in the appeal or on the merits of the chamber summons seeking impleadment of the parties to the suit.

Issues :
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33. The rival contentions have given rise to the following issues:

(1) Whether the impugned order dated 26th October, 2004, to the extent it rejects Chamber Summons No.1334/2004, is legal and valid?

(2) Whether the appellants are entitled to be impleaded as parties to the suit?

(3) If yes, in what capacity?

(4) What order?

Consideration :
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34. Having heard parties, at the outset, we must first consider the merits of Chamber Summons No.961/2005 filed in appeal seeking amendment to the original Chamber Summons No.1334/2004. Considering the no-objection given by respondent No.1 - G.I.S. Society (now sole plaintiff in the suit), it can conveniently be treated as no-objection by a person who is 'dominus litis'. So far as objection raised by co-defendant/ respondent No.55 (Mrs.Kusum) is concerned, no prejudice has been demonstrated to us if the Chamber Summons No.961/2005 is allowed. Since the parties have addressed on merits of the controversy treating the amendment as allowed, we see no difficulty in allowing the Chamber Summons No.961/2005 moved in the present appeal. Thus, we grant amendment to the Chamber Summons No.1334/2004 excluding portion marked 'A', the prayers claiming interim reliefs. The appellants shall be free to carry out necessary amendment to the Chamber Summons No.1334/2005 in due course.

35. Having allowed the amendment to Chamber Summons No.1334/2005, before considering the merits of the issue involved, it is needless to mention that to join the appellants as parties to the suit would

definitely depend upon the reliefs that have been claimed. It shall have to be examined whether these reliefs cannot be granted without the intervention and participation of the appellants. If it is so, then they would definitely be called as "necessary parties". At this stage, advertance to sub-rule (2) of rule 10 of order 1 of C.P.C. would not be out of place, which reads as under:

"**Order 1, Rule 10.**

....

(2) *Court may strike out or add parties*. - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

....

36. The reading of sub-rule (2) of rule 10 of order 1, the object behind it is to discourage contests on technical pleas, and to save honest and bona fide claimants from being non-suited. The power to strike out or add parties can be exercised by the Court at any stage of the proceedings. Under this

rule, a person may be added as a party to a suit in the following two cases: (1) when he ought to have been joined as plaintiff or defendant, and is not joined so, or (2) when, without his presence, the questions in the suit cannot be completely decided.

37. Sub-rule (2) or rule 10 of order 1 of C.P.C. enables the Court to add any person as a party at any stage of the proceedings if the person whose presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of a multiplicity of proceedings is also one of the objects of the said provision in the Code.

38. In **Khemchand Shankar Choudhari v. Vishnu Hari Patil**, (1983) 1 SCC 18 the Apex Court held that a transferee pendente lite of an interest in an immovable property which is the subject matter of a suit is a representative in the interest of the party from whom he has acquired that interest and has a right to be impleaded as a party to the proceedings. The Apex Court has taken note of the provisions of section 52 of the Transfer of Property Act, 1882 as well as the provision of rule 10 of order XXII of C.P.C. The Apex Court observed:

" It may be that if he does not apply to be impleaded, he may suffer by default on

account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard."

39. In **Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay**, (1992) 2 SCC 524 the Apex Court discussed the matter at length and held that though the plaintiff is a "dominus litis" and not bound to sue every possible adverse claimant in the same suit, the Court may at any stage of the suit direct addition of parties and generally it is a matter of judicial discretion which is to be exercised in view of the facts and circumstances of a particular case. The Apex Court observed:

> "8. The case really turns on the true construction of the rule in particular the meaning of the words 'whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit'.
>
> . The court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct the addition of a person whose presence is not necessary for that purpose. If the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the court has power to join the intervener so as to give effect to the primary object of the order which is to avoid multiplicity of actions."

The Apex Court also observed that though prevention of actions cannot be said to be the main object of the

Rule, it is a desirable consequence of the Rule. The test for impleading parties prescribed in **Razia Begum v. Sahebzadi Anwar Begum**, AIR 1958 SC 886 : 1959 SCR 1111 is that the persons concerned must have a direct interest in the action.

40. The Apex Court in the case of **Razia Begum** (supra), after considering various judgments, ruled amongst others - (i) the question of addition of parties under order 1 rule 10 of C.P.C., is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case and (ii) that in a suit relating to the property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject matter of litigation.

41. The Apex Court, in the recent judgment in the case of **Amit Kumar v. Farida Khatoon**, 2005 (3) Mh.L.J. 330, ruled that the power of a Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.

42. Considering the provision of sub-rule (2) of rule 10 of order 1 of C.P.C.; the object thereof appearing in the mind of the legislature; and the law developed and enunciated by the Apex Court, before allowing any prayer under order 1 rule 10(2), it is necessary to examine whether a person seeking impleadment has prima facie right in the subject matter of the suit and his presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settled all the issues involved in the suit. The Apex Court in **Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar**, AIR 1963 SC 786 observed:-

> "To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled; it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

43. As a matter of fact, the recent judgment of the Apex Court in the case of **Amit Kumar** (supra) has diluted the test to be applied while adding the person as a party to the proceedings. The Court went to the extent of saying that the power of the Court to add party cannot depend solely on the question whether he

has interest in the suit property what is required to be seen is whether he would suffer any prejudice, if he is not allowed to participate in the suit.

44. The nature of the controversy involved would equally decide the status of the party, namely, whether it is necessary or not. Both questions have to be considered side by side. From that point of view, the controversy raised in this appeal would require close scrutiny. Factual matrix reveals that originally Mrs.Kusum entered into an agreement dated 28th April, 1980 to purchase the suit property. She obtained possession, may be to develop suit property. It was asserted by Mrs.Kusum in the suit that she was in possession of the suit property, in part performance of the agreement, referable to section 53A of the Transfer of Property Act. This is clear from the recitals in para-8 of the plaint.

45. At this juncture, we may usefully extract and reproduce the following classic statement of law from **Perry v. Clissold**, 1907 AC 73 : 76 LJPC 19 quoted with approval in **Nair Service Society Ltd. v. K.C. Alexander**, AIR 1968 SC 1165:

> " It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful

> owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title."

46. The recitals of the plaint further make out a case of overtact in furtherance of the contract so as to claim benefit of section 53A of the Transfer of Property Act. Willingness on her part to discharge her obligation to complete the transaction of purchase is also pleaded in the plaint. It is, thus, clear that prima facie Mrs.Kusum claimed possessory title over the suit property.

47. Considered from different angle, assuming that Mrs.Kusum was not placed in possession of the suit property under section 53A of the Transfer of Property Act, in part performance of the agreement and was placed in possession of the suit property just to develop it under the agreement dated 28th April, 1980. Even then it cannot be denied that the development rights, with a view to do business on the suit property, were obtained by Mrs.Kusum. In order to undertake business of property development, she established a proprietorship firm under the name and style "M/s.Chitralekha Builders". It is not in dispute, rather it is an admitted position that she entered into the agreement of partnership on 8th

April, 1989 with Mrs.Neena A. Shah, Mr.S.J.Pakhare and Mr.S.J.Gadekar. The partnership firm was to develop the said property and to do business thereon. One of the contentions is: suit property which was in possession of Mrs.Kusum, was brought by her as her capital in the partnership firm. In this view of the matter, one of the important issues in the suit would be with respect to the interests of the partners in the suit property.

48. In **Arjun Kanoji Tankar v. Shantaram**, (1969) 3 SCC 555, a contention was raised that in any event by virtue of section 14 of the Partnership Act, all the assets with the aid of which the business was carried on by the plaintiffs must be deemed in law to have become the partnership assets under the deed of partnership. It was held that under section 14 the property belonging to a person, in the absence of any agreement to the contrary, does not on a person entering into a partnership with others, become the property of the partnership merely because it is used for the business of the partnership only if there is an agreement express or implied that the property was, under the agreement of partnership, to be treated as the property of the partnership. This judgment was followed by this Court in **Nariman Aspandiar Irani v. Adi Merwan Irani**, 1990 Mh.L.J. 265 : AIR 1989 Bom. 362.

49. In **Sunil Siddharthbhai v. Commr. Income-tax**, AIR 1986 SC 368, while considering the expression "Transfer of Property" the Apex Court has observed as under:

> " In its general sense, the expression "transfer of property" connotes the passing of rights in the property from one person to another. In one case there may be a passing of the entire bundle of rights from the transferor to the transferee. In another case, the transfer may consist of one of the estates only out of all the estates comprising the totality of rights in the property. In a third case, there may be a reduction of the exclusive interest in the totality of rights of the original owner into a joint or shared interest with other persons. An exclusive interest in property is a larger interest than a share in that property. to the extent to which the exclusive interest is reduced to a shared interest it would seem that there is a transfer of interest. Therefore, when a partner brings in his personal asset into the capital of the partnership ;firm as his contribution to its capital he reduces his exclusive rights in the asset to shared rights in it with the other partners of the fir. While he does not lose his rights in the asset altogether what he enjoys now in an abridged right which cannot be identified with the fullness of the right which he enjoyed in the asset before it entered the partnership capital."

50. Considering the above judgment, this Court in the case of **Sunil Siddharthbhai** (supra), ruled-

> "It becomes apparent that when a partner brings in his personal asset into partnership firm as his contribution to the capital, an asset which originally was subject to his entire ownership of the partner, becomes now subject to the rights

> of other partners in it. In other words, the partner who brings in the asset reduces his exclusive right in the asset to the shared rights in it with other partners of the firm."

These judgments were followed by this Court in **Shivraj Fine Arts Litho Wordks v. Judge, First Labour Court, Nagpur**, 1982 (2) Bom.C.R. 343. The above legal position, if considered in the light of the documents available on record viz. deed of partnership dated 8th April, 1989 and the certificate of registration issued by the Registrar of Firms evidencing incorporation of the names of four partners and registration of the partnership firm, unequivocally, raises an issue with regard to the interest of the appellant in the suit property.

51. In order to effectually and completely adjudicate upon the issue as to whether the suit property belongs or belonged to partnership firm or its partners or it remains the property of Mrs.Kusum, proprietress of the proprietary firm M/s.Chitralekha Builders, the presence of the appellants before the Court would be necessary. This issue by no stretch of imagination could be decided in absence of the present appellants. In our considered view, learned single Judge was in error in dismissing the Chamber Summons No.1334/2004 of the appellants seeking impleadment to be a party to the suit on narrow consideration. This

is a case; wherein learned single Judge ought to have exercised discretion to implead the appellants as defendants, if there was serious objection of the plaintiff to add them as co-plaintiffs. The judgment, on which learned single Judge has relied upon, itself indicates such power in favour of the Court under order 1 rule 10(2) of C.P.C. We would merely refer to (**Banarasidass Durgaprasad v. Panna Lal Ram Richpal**) AIR 1969 Punjab & Haryana 57; wherein it has been observed:

> "I would prefer to steer a middle course and draw the golden mean. As a rule, the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. the reason is that the plaintiff is the dominus litis. He is the master of the suit. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief."

It was further observed :

> "In exercising that discretion, the Courts will invariably take into account the wishes of the plaintiff before adding a third person as defendant to his suit. Only in exceptional cases where the Court finds that addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant without the consent of the plaintiff."

This judgment was followed by this Court in **Harisha v.**

Municipal Corporation, Amravati, 1987 (3) B.C.R. 19.

52. Apart from the above, dismissal of earlier Chamber Summons No.1040/1998 vide order dated 15th July, 1999 could not have been used to non-suit the appellants. The impugned order did not take into account proper scope of sub-rule (2) of rule 10 of order 1 of C.P.C. and, therefore, cannot stand to the scrutiny of law.

53. Having said so, now the original chamber summons needs consideration in view of changed scenario, considering the subsequent events which have taken place during the pendency of the suit. It has become necessary to consider whether or not the prayer for impleadment survives. The present suit, at any rate, is now between G.I.C.Society and Mrs.Kusum representing M/s.Chitralekha Builders. The contention is that M/s.Chitralekha Builders became partnership firm of which the present appellants were partners. The suit property involved in the present suit is that of Chitralekha Builders; wherein appellants are claiming their interest, final adjudication whereof would be a subject matter to be adjudicated in the suit.

54. Alternatively, assuming that the partnership firm stood dissolved, even then, prima facie; suit can continue to proceed because cause of action, if

any, for the suit was alive when the partnership firm was in existence.

55. Having said so, one has to consider the reliefs claimed in the suit by the plaintiff - G.I.C. Society. The plaintiff is claiming specific performance of contract in respect of immovable property viz. suit property; wherein appellants are claiming interest based on documentary evidence, existence and execution of which is not in dispute. The discretion as given in sub-rule (2) of rule 10 of order 1 of C.P.C. coupled with the observations made in the case of **Udit Narain Singh Malpaharia** (supra), would give the sufficient idea regarding meaning of the term "necessary and proper parties". Reverting back to the facts of the present case on hand, it is clear that the suit property is at stake. Appellants are claiming interest in the suit property. Plaintiff - G.I.C. Society has given no objection for impleadment of the appellants as party defendants. Mrs.Kusum could not demonstrate any prejudice to her interest, if chamber summons of the appellants is allowed. Thus, considering the scope of sub-rule (2) of rule 10 of order 1 of C.P.C., in our view, appellants deserve to be added as party defendants as they ought to have been joined as plaintiffs or, at any rate, as defendants in the suit. Even in the changed scenario, without their presence the issues

involved in the suit cannot be completely and effectually adjudicated upon. The interest of the appellants, if any, is bound to be affected in the event they are not allowed to be party to the suit. The appellants are entitled to defend suit. As a matter of fact this is a fit case for exercise of discretion by the Court under order 1 rule 10(2) of C.P.C. However, in view of amendment to the chamber summons and invocation of powers of this Court under order 1 rule 10(2), it is not necessary to exercise that power because the same purpose is being served by allowing it in exercise of that powers.

56. We must clarify that all the observations made by us in the order are prima facie made with a view to consider whether or not chamber summons should be allowed. We should not be understood to have expressed any opinion on the merits of any of the issues involved. All rival contentions on merits of the issues involved in the suit are left untouched. It will be open to the Court trying suit to decide all issues on its own merits.

57. In the aforesaid view of the legal position, we are of the view that the appellants are entitled to be party defendants to the suit in order to enable the Court to effectually and completely decide the suit and settle all issues involved therein.

Conclusion :
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58. In the result, the impugned order dated 26th October, 2004 to the extent it rejects Chamber Summons No.1334/2004 in Suit No.1335.1988 is quashed and set aside. Appeal is allowed. The plaintiff - G.I.C. Society (present plaintiff in the suit) is directed to add the names of the appellants as party defendants to the suit within 15 days from today. Suit to proceed in accordance with law as expeditiously as possible considering the nature of the suit and rights of the parties involved therein.

(A.S.AGUIAR, J.) **(V.C.DAGA, J.)**